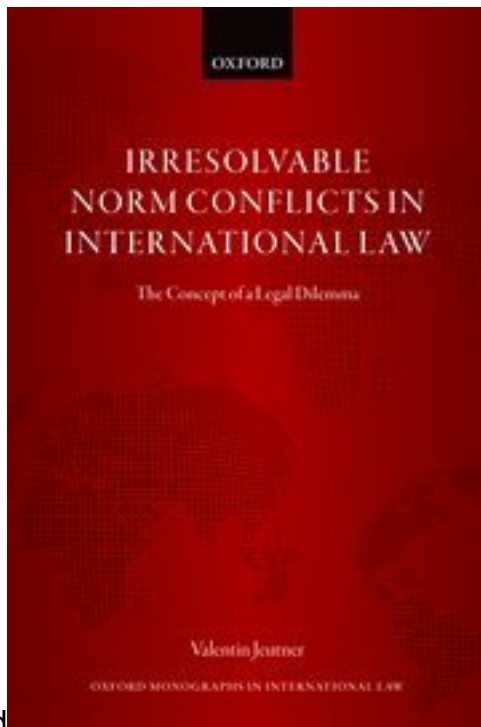


# Legal dilemmas: the first step towards a solution is to acknowledge the problem

Lea Wisken

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Imagine that you are the captain of a ship



located

halfway between several people drowning. You have a duty towards each of them but are unable to save everyone. In such a situation, Valentin Jeutner argues, you are confronted with not only a moral but possibly also a legal dilemma. The notion of a legal dilemma challenges the assumption that international law is a coherent system providing a binary classification for each action as either legal or illegal. A legal dilemma arises when an action is both legal and illegal at the same time.

The impulsive reaction is that such a situation should not exist because it would impose an impossible or unfair demand on an actor. Jeutner, however, responds that “conflicts cannot be presumed not to exist merely because it might seem desirable that they should not”. Necessarily, acknowledging a problem is the first step towards finding a solution. The book develops a concise and compelling argument to demonstrate the plausibility and relevance of the concept of a legal dilemma. It also gives its readers a taste of the practical use that can be drawn from adding this concept to their conceptual toolbox. The argument is structured by three questions: First, what is a legal dilemma? Second, can legal dilemmas exist in contemporary international law? And third, by whom and how should a legal dilemma be decided?

Jeutner defines a legal dilemma as an irresolvable and unavoidable conflict between legal norms, where obeying or applying one norm necessarily entails the undue impairment of another. He makes the complex concept palatable by breaking it down into its core components and outlining each element separately. As the book's title suggests, the central element of the concept is irresolvability. A conflict is irresolvable when it "cannot and/or should not be resolved by means of international law's norm conflict resolution devices". In the second part of the book, Jeutner systematically examines conflict resolution devices and identifies several configurations in which none of them work – thus demonstrating the possibility of a legal dilemma. Less central to the concept is the notion of unavoidability. For the purposes of the definition of a legal dilemma, unavoidability covers not only conflicts that "could not" but also conflicts that "simply have not" been avoided (which arguably comes down simply to conflicts that exist and are not merely hypothetical).

One main strength of the book is the way in which Jeutner uses a breadth of different empirical examples for illustration, without ever relying on them to substantiate his argument. The examples provide interesting puzzles and draw on various areas of international law, including humanitarian and maritime law. They make the book accessible and clarify the relevance of the concept for international politics. Yet the argument does not stand and fall with claims about any particular legal conflict. Instead, the examples are used in the way of thought-experiments: ornaments to the stringent line of argument that demonstrates the possibility of a legal dilemma by way of logical deduction.

Jeutner, however, does not leave it at this; he ventures further to explore the practical implications of the concept. From an International Relations perspective, the third question, by whom and how a legal dilemma should be decided, is highly relevant. In a nutshell, Jeutner proposes that determining *whether* a legal dilemma exists should be left to the international judiciary. However, the decision on *how to act* in the face of such a dilemma should be taken by political decision-makers. In our previous example, the captain has to choose which person to save; neither the law nor anybody else cannot take this decision for them. Jeutner proposes that dilemmas call "for an explicitly political debate" and outlines a range of arguments for putting this decision in the hands of sovereign actors rather than courts.

To this proposal, Jeutner introduces two addendums. First, the decision "has no precedential value whatsoever". Second, the actor will need to provide compensation – in our example, for failing to save the people that are now at the bottom of the ocean. Those might not mind either way (being dead), but the captain might be ordered to pay compensation to relatives. I am left wondering whether anyone would still volunteer for the coast guard if one alerted them of the possibility and implications of legal dilemmas. Acknowledging such concerns, Jeutner extends an invitation to show mercy when it comes to holding actors accountable for dilemmatic decisions.

This solution is imperfect insofar as depending on the mercy of others still seems relatively harsh. A second concern is that it structurally incentivizes decision-makers to prioritize permissive norms (permissions and exemptions) over prescriptive norms (duties and prohibitions). Take Jeutner's example of the dilemma faced by

a decision-maker who must choose between exercising the right to self-defence against an attack by launching a nuclear strike and abiding by the prohibition of the use of nuclear weapons. If they decide to forego the right to self-defence: tough. They will have to live with the consequences of having failed to defend their country, provided they survive the attack. If, however, they launch the nuclear strike, they at least stand the chance of being granted mercy. Decision-makers are thus incentivized to opt for the latter. Perhaps one could introduce a mechanism to compensate states for forfeiting their rights in situations of legal dilemma; yet whether this would work in practice, particularly on a voluntary basis, is doubtful.

Another practical concern is that in the fragmented international legal order – which is particularly likely to produce legal dilemmas – there will often not be a legal body with jurisdiction over both rules involved – and hence none able to pronounce a legal dilemma. For instance, the World Trade Organization Dispute Settlement Body (WTO DSB) does not have jurisdiction over rules outside the WTO's perimeters. The WTO DSB could therefore not, for example, declare a legal dilemma involving a WTO rule and, say, a rule by the World Health Organization.

These concerns can inspire new solutions, such as closing such gaps in international jurisdiction. Further, even if some problems remain, this does not mean that there is necessary a better solution available. Jeutner makes a very important point in highlighting that a major disadvantage to courts attempting to decide legal dilemmas is that binary distinctions can, sometimes, “impair law's ability to contribute to the peaceful settlement of disputes and it can call into question international law's regulatory monopoly of violence”. This assessment corresponds to the [finding](#) in my own research that in inter-institutional norm collisions, legal verdicts have virtually no effect on the *de facto* outcome of the dispute. Pronouncing a legal verdict in a situation in which the legitimacy of the verdict is prone to be called into question one way or the other is risky for international courts, because the odds of non-compliance are high and non-compliance in turn undermines the courts' authority.

In international politics, sovereigns have to navigate an increasingly fragmented set of legal rules from overlapping institutions. The concept of a legal dilemma acknowledges the *de facto* legal uncertainty regularly faced by international decision-makers. Jeutner's suggestion for how to deal with such legal dilemmas makes a fruitful contribution to the ongoing interdisciplinary discussion on [regime complexes](#) and legal fragmentation. As Jeutner puts it, the concept of a legal dilemma “shifts the focus from conventional attempts to establish the one right answer at all costs” to “more productive, concerted efforts to find creative solutions for extremely difficult problems”.

*Lea Wisken holds a PhD in International Relations from the Free University of Berlin. Her thesis examines institutional overlap and norm collisions in international law. At present, she coordinates the process of creating a new [mobility law](#) for the city of Berlin.*

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